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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-81

HONORABLE ROMAE POWELL, individually and as Judge of the Juvenile Court of Fulton County; DAVID ENGLAND, individually and as Warden of the Georgia Industrial Institute; and ALLEN AULT, individually and as Commissioner of the Department of Offender Rehabilitation,

Appellants,

v.

RICHARD WAYNE LONG and all other persons similarly situated, by and through his next friend, HENRY GRADY LONG,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the Northern District of Georgia, entered February 11, 1975, which enjoined the

Appellants from enforcing Ga. Code § 24A-2304 which authorizes the commitment of certain delinquent or unruly juveniles to the Georgia Department of Offender Rehabilitation. The Judgment enjoins the enforcement of this section, as applied; the District Court, however, sustained the facial constitutionality of the statute. This Statement is presented to show that the Supreme Court of the United States has jurisdiction and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court upon which the Judgment appealed from was entered is reported at 388 F.Supp. 422 (N.D. Ga. 1975) and is attached hereto as Appendix A.

The Judgment of the District Court is not reported and is attached hereto as Appendix B.

The Order denying Appellants' timely Motion for New Trial is attached hereto as Appendix C.

JURISDICTION

The Appellees, juveniles committed to the Georgia Department of Offender Rehabilitation, filed this action in May, 1974, seeking an injunction against the enforcement of Ga. Code § 24A-2304. This section permits the juvenile courts of Georgia to commit juveniles found "not amenable to rehabilitation or

treatment" to the Department of Offender Rehabilitation of which Appellant Ault is Commissioner. Appellees sought the injunction pursuant to 42 U.S.C. § 1983 alleging that the statute denied delinquent juveniles rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The jurisdiction of the District Court was predicated upon 28 U.S.C. § 1343(3) and (4).

The Appellants moved on May 31, 1974, to dismiss the complaint for want of jurisdiction since the injury alleged by Appellees --- confinement in an adult prison --- was no longer permitted under Georgia law as interpreted by the Georgia Supreme Court or departmental policy and the claim had therefore become moot.

The Court below did not dismiss the action but held that the application of Ga. Code § 24A-2304 by the Georgia executive agencies charged with its enforcement was itself unconstitutional and therefore the Court enjoined what it held to be was an unconstitutional application of the statute. (Appendices A and B). Appellants filed a timely Motion for New Trial which was denied on March 28, 1975. (Appendix C). Notice of Appeal to this Court was filed in the United States District Court for the Northern District of Georgia on May 16, 1975 (Appendix D).

The jurisdiction of this Court to review on direct appeal the injunction entered by the District Court and to review its order denying Appellant's timely Motion for New Trial is conferred by 28 U.S.C. § 1253 since the case was required to be determined by a three-judge district court. 28 U.S.C. § 2281. See also, Golden v. Zwickler, 394 U.S. 103 (1969); Fleming v. Rhodes, 331 U.S. 100, 103-4 (1947).

STATUTES INVOLVED

The challenged statute, Ga. Code § 24A-2304 (Ga. Laws 1971, pp. 709, 735), provides:

> "Child not amenable to treatment and rehabilitation. In the event a delinquent or unruly child is found not to be amenable to rehabilitation or treatment, the Court may commit said child to the Department of Corrections."1/

Other pertinent portions of the Georgia Juvenile Court Code are included in Appendix E.

1/ Ga. Laws 1972, pp. 1069, 1073 created the Department of Offender Rehabilitation which assumed the duties of the Department of Corrections. Accordingly, we will refer throughout to the Department of Offender Rehabilitation.

QUESTIONS PRESENTED

1. Whether the case should have been dismissed for want of federal jurisdiction on the ground of mootness when the jurisdiction of the District Court was predicated upon the alleged unconstitutionality of the confinement of juveniles in adult prisons, and the possibility of such confinement was negated by a decision of the Georgia Supreme Court and that decision was implemented by the Appellants.

2. Whether the due process clause of the Fourteenth Amendment requires strict and literal adherence to the juvenile court laws of a State on the theory that such adherence is the quid pro quo of juvenile court jurisdiction or whether, on the contrary, a deprivation of due process occurs only when the juvenile has been denied rights independently guaranteed by the Constitution.

3. Whether the equal protection clause of the Fourteenth Amendment allows the State to grant to the legal custodian of a delinquent juvenile the duty to determine his plan of rehabilitation and treatment and to determine when he may be discharged from legal custody.

4. Whether the District Court abused its discretion in failing to abstain from deciding the due process and equal protection issues since both

holdings required the Court to first construe provisions of Georgia law not previously construed by State courts.

STATEMENT OF THE CASE

Georgia adopted a comprehensive and substantially modernized Juvenile Court Code in 1971 (Ga. Laws 1971, p. 709). Ga. Code Title 24A. In general, the new Code provided that youthful offenders were not to be treated as criminals but were to receive special treatment and rehabilitation without the stigma or civil disabilities which attach because of a criminal record. Moreover, the new Code recognized the procedural due process rights guaranteed by this Court in In re Gault, 387 U.S. 1 (1967). Other procedural rights were also guaranteed. See Ga. Code § 24A-2001. A juvenile is not indicted nor does he receive a public trial by jury but he has virtually all other rights afforded in criminal trials. A floor amendment to the proposed Code, the provision challenged below, provides:

> "In the event that a delinquent or unruly child is found not to be amenable to rehabilitation or treatment the court may commit said child to the Department of [Offender Rehabilitation]." Ga. Code § 24A-2304.

The Department of Offender Rehabilitataion [hereinafter referred to as "DOOR"] administers the adult penal

system in Georgia, Ga. Code Ann. Ch. 77-5A, (Ga. Laws 1972, p. 1069, et seq) while the Department of Human Resources [hereinafter referred to as "DHR"] administers most juvenile treatment programs. Ga. Code Ann. Ch. 99-2 (Ga. Laws 1963, p. 81 et seq.)

In the section immediately following Ga. Code § 24A-2304, the Juvenile Court Code provides, in part:

> "A child shall not be committed to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime." Ga. Code § 24A-2401.

The apparent conflict between Code Sections 2304 and 2401 was not considered by the Georgia Supreme Court until February, 1974, at which time that Court concluded

> ". . . that a juvenile may be committed to the custody of the Department of [Offender Rehabilitation], but the Department of [Offender Rehabilitation] must not place such juveniles in one of its institutions used primarily for the incarceration of persons convicted of crimes." A.B.W. v. State, 231 Ga. 699, 701 (203 S.E. 2d 512, 513)(1974).

DOOR had no facilities which would be suitable for juveniles under the interpretation of the Georgia Supreme

Court in A.B.W. and therefore had to arrange for a different place of confinement. Appellant Ault, Commissioner of DOOR, upon the advice of the Attorney General, sought to transfer the juveniles committed under Ga. Code § 2304 to DHR. Negotiations between DOOR and DHR began immediately after the A.B.W. decision was rendered and an agreement between the Departments was signed on May 20, 1975, and the juveniles were transferred to a DHR juvenile center shortly thereafter. The agreement between the Departments provided, in essence, that legal custody remained with DOOR pursuant to the order of the juvenile court under Ga. Code § 2304 but that physical custody would be transferred to DHR. DHR was then authorized by the agreement to treat § 2304 juveniles like all others except that DOOR, as legal custodian, was required to approve the release of a juvenile from a youth development center and his later discharge from all supervision.

This action was filed on May 3, 1974, seeking to enjoin the enforcement of Ga. Code § 24A-2304 on the ground that it was constitutionally deficient in several respects. Plaintiff first alleged that the confinement of juveniles in adult prisons, allegedly contemplated by Ga. Code § 24A-2304, without all the procedural rights accorded to adult criminal defendants violated the juveniles' right to due process of law. Second, they alleged that their confinement alongside of adult prisoners who had

received these additional procedural rights violated the juveniles' right to equal protection of the law. Third, the statutory language, "not amenable to rehabilitation or treatment" was alleged to be unconstitutionally vague. On May 31, 1974, Appellants moved to dismiss the action for want of jurisdiction on the ground of mootness. No action was taken by the Court on the Motion and the case was set down for a hearing before the three-judge District Court. In a Stipulation of Facts, the parties agreed that all § 2304 juveniles were then in the physical custody of DHR pursuant to the inter-departmental agreement. A hearing was held by the District Court on January 7, 1974, at which time Appellants again urged that the Court lack jurisdiction because of mootness.

The District Court, however, concluded that the case was not moot. It found that the agreement between DOOR and DHR, even though required by a decision of the Supreme Court of Georgia, did not assure cessation of the allegedly unconstitutional treatment of the juvenile Appellees. Indeed, the Court based its injunction on its belief that the agreement was "a faulty implementation of the newly construed Section 2304 which renders that statute unconstitutional as applied." (p. 11a) The decision was not based on the injury alleged by the Appellees --- their confinement along with adult prisoners --- but instead was based on what the Court perceived as an unconstitutional application of the Georgia statute. The Court reasoned,

without precedent, that the agreement violated Georgia law and that because persons tried in juvenile court were required to forego certain procedural rights guaranteed to adults accused of crimes they had been denied the quid pro quo of the Georgia juvenile justice system which denial constituted a violation of their right to due process of law.

However, the Court also concluded that Ga. Code § 24A-2304 was not vague and that it was constitutional on its face, holding that the commitment of juveniles to the Department of Offender Rehabilitation was not unconstitutional per se. The Court therefore denied Appellees' prayer for an injunction against all enforcement of the statute.

THE QUESTIONS ARE SUBSTANTIAL

1. The jurisdiction of the District Court was predicated upon the alleged unconstitutionality of the confinement of juveniles in adult prisons; when the possibility of such confinement was negated by a decision of the Georgia Supreme Court and that decision was implemented by the Appellants, the case became moot and should have been dismissed for want of federal jurisdiction.

Under Article III of the Constitution, United States courts may exercise judicial power only in those instances when an actual case or controversy is presented. Liner v. Jafco, Inc., 375 U.S. 301, 306 (1964); See also, Powell v. McCormack, 395 U.S. 586, 496, n.7 (1969); Sibron v. New York, 392 U.S. 40, 50, n. 8 (1968).

The Appellees challenged Ga. Code § 24A-2304 on the ground that it allowed their confinement, following an adjudication of delinquency by a juvenile court, in adult penal institutions. Each count of the Complaint was premised on the simultaneous confinement of delinquent juveniles with adult criminals. By virtue of the decision of the Georgia Supreme Court in A.B.W. v. State, supra, the Appellees were all removed from adult prisons and placed in institutions operated by the Department of Human Resources (DHR) which provides the juvenile treatment programs for the great majority of committed juveniles. The Court below found that the transfer of custody was made pursuant to the

Georgia Supreme Court decision and not as the result of the initiation of this litigation. (p. 6a). Upon acknowledgment of this situation, the Court should have then concluded that there was no longer a "definite and concrete" controversy between the parties, Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240 (1937) and hence that it lacked jurisdiction "to decide questions that [could] not affect the rights of litigants" before it. North Carolina v. Rice, 404 U.S. 244, 246 (1971).

The "right" alleged by the juvenile Appellees was the right not to be confined with adult prisoners. That "right" had already been recognized, as an element of the Georgia juvenile justice system in the Georgia Supreme Court's interpretation of Ga. Code § 24A-2304, A.B.W. v. State, 231 Ga. at 701, 203 S.E. 2d at 513.

This interpretation was implemented with reasonable promptness by DOOR and DHR, after consultation with the office of the Georgia Attorney General.

The Court, however, concluded that the agreement between DOOR and DHR was a form of voluntary cessation, that the Departments were free to return to the prior practice and thus that the action was not moot. See, United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). Nothing in the record, indeed, nothing in the Court's opinion, supports an inference that there is a remote

possibility of Appellants' returning to the practice of confining juveniles with adults.

A.B.W. v. State was the first Georgia Supreme Court decision interpreting the challenged statute. DOOR and DHR signed an agreement on May 20, 1974, providing for the transfer of physical custody of all § 2304 juveniles to DHR. Appellees stipulated that, as of the hearing date, January 7, 1975, this agreement had been complied with and all § 2304 juveniles were in DHR institutions. The settled practice of this Court, "in contexts no less significant, [is] fully to accept representations such as these as parameters for decision." DeFunis v. Odegaard, 416 U.S. 312, 317 (1974); See also Gerende v. Board of Supervisors, 341 U.S. 56 (1956). And, of course, the assurances of Appellants have special force since the agreement was undertaken to implement State law as recently determined by the State Supreme Court. See Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 162 (1971).

The crux of the Court's decision on mootness, as well as on the merits of this case, was the perceived "faulty implementation of the newly construed § 2304 which renders that statute unconstitutional as applied." (p. 11a). This "faulty implementation" was not the impermissible confinement of juveniles with adults but rather the breach of the "quid pro quo" which the Court believed each juvenile was supposed to receive in Georgia's juvenile justice system. (pp. 10a - 13a). Having recognized, however,

that Georgia law did not permit the confinement of juveniles with adult criminals and further that the administrative agencies charged with the Code's enforcment were not going to so confine them, in violation of State law, the judicial power of the District Court was ended and the case should have been dismissed for want of Article III jurisdiction.

2. The due process clause of the Fourteenth Amendment does not require strict and literal adherence to the juvenile court laws of a state on the theory that such adherence is the quid pro quo of juvenile court jurisdiction but, on the contrary, a deprivation of due process occurs only when the juvenile has been denied rights independently guaranteed by the Constitution.

Although the Court below implicitly recognized that the original claim no longer presented an actual controversy because of the implementation of Georgia law, it contrived and adjudicated new causes of action which find no basis in the decisions of this Court. The District Court held "the procedures provided by the DOOR/DHR agreement thus violate the quid pro quo of the parens patriae theory underlying the juvenile justice system", citing generally In re Gault, 387 U.S. 1, 14-29 (1967)(p. 12a).

In finding deprivations of due process, the Court first determined the expectations of the drafters of the Georgia Juvenile Court Code and then found that these expectations were not met in practice. The juveniles' right to due process was violated, the Court thought, because Georgia had failed to hold up its part of the quid pro quo. A similar theory was used by the Fifth Circuit Court of Appeals to establish a right to treatment for persons involuntarily committed to mental health institutions. Donaldson v. O'Connor, 493, F2d 507 (5th Cir. 1974). This Court vacated that judgment. O'Connor v. Donaldson, ____ U.S. ____ 43 U.S.L.W. 4929 (1975), see especially, n. 12.

the quid pro quo theory is not supported by this Court's decision in O'Connor and is explicity rejected in the concurring opinion of the Chief Justice, who first canvassed the requirements of procedural due process and then stated: "The quid pro quo theory is a sharp departure from, and cannot coexist with, these due process principles." The Chief Justice found that one "troublesome feature of the quid pro quo theory is that it elevates a concern for essentially procedural safeguards into a new substantive constitutional right." See also, Developments in the Law - Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1325, n. 39 (1974). Indeed, the theory actually dispenses with procedural safeguards so long as "the State provides benefits which, in the view of a court, are adequate "compensation" for confinement.

The version of the quid pro quo notion adopted by the Court below is particularly unpersuasive. That Court found that Georgia law contemplated that a juvenile committed under Ga. Code § 24A-2304 receive special treatment in a secure setting not ordinarily available for juveniles and that his records not reflect confinement in an adult penal institutuion.[2/] Since the DOOR/DHR

2/ The Court below ignored two of the most important benefits of the juvenile justice system - the confidentiality

application of Code § 24A-2304 did not provide these, the quid pro quo was breached, running afoul, then, of the due process clause. This clearly is a new form of substantive due proces. Neither special treatment of § 2304 juveniles nor records free of indication of prison confinement are independently required by the Constitution. The only reason they became constitutionally mandated was the District Court's interpretation of Georgia law.

The fifty states have varied provisions regarding the jurisdiction and role of the juvenile court and the task of rehabilitation and treatment is assigned to different administrative agencies. There is no constitutional principle which requires a section like Ga. Code § 24A-2304 and it is our understanding that a majority of States have no such provision. If such a juvenile code provision is not constitutionally required, no federal question is presented by an alleged misapplication of the statute. Snowden v. Hughes, 321 U.S. 1 (1943).

Similarly, the Constitution, as the Court below recognized (p. 10a), does not dictate which administrative agency be given responsibility for juvenile

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2/ (Cont.) of the juvenile's records required by Ga. Code Ch. 24A-35 and the failure to impose civil disabilities as a result of an adjudication of delinquency. Ga. Code § 24A-2401.

rehabilitation programs. In some states, the same agency administers both the penal and juvenile institutions and confinement in a prison is permitted if juveniles are not confined in proximity to adult criminals. Thus, a notation in a juvenile's file that he was temporarily confined to a prison does not abridge a specific constitutional right. It is difficult for Appellants to understand what injury the juvenile Appellees have suffered because of such notations since we stated in open court that the records of all current § 2304 juveniles would be expunged and, in any event, juvenile court records are available only in limited circumstances. Ga. Code Ch. 24A-35 (Appendix E).

The absorption of substantive provisions of the Georgia Juvenile Court Code into the due process clause by the operation of the discredited quid pro quo analysis threatens unwarranted interference with Georgia's juvenile justice system. This analysis should be reviewed by this Court and unequivocally rejected.

3. The equal protection clause of the Fourteenth Amendment allows the State to grant to the legal custodian of a delinquent juvenile the duty to determine his plan of rehabilitation and treatment and to determine when he may be discharged from legal custody.

DOOR-DHR's application of the challenged Code Section allowed DOOR, as legal custodian pursuant to a juvenile court order, to retain the right to decide on the juvenile's release from a youth development center and his date of discharge from all supervision. The District Court held that this was an incorrect application of Georgia law, specifically Ga. Code § 24A-2701(b)[3/] and also, without citation of authority, a deprivation of equal protection since DHR had these prerogatives for other juveniles.

The dispositional provisions of the Georgia Juvenile Court Code are broad, allowing the juvenile courts to select any legal custodian who can provide the plan of treatment and rehabilitation best suited to an individual child. Ga. Code §§ 24A-2301 through 4. While DHR has custody of most delinquent juveniles, commitment to DHR is only one of the statutory alternatives. Individualized treatment and rehabilitation are recognized as important goals of the juvenile

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3/ See, Part 4, infra.

justice system.[4/] The States remain free "to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . ." McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). Previous decisions of this Court do not mandate that only one State agency be charged with the responsibility for the juvenile rehabilitation programs but allow the commitment of children to different individuals and agencies for treatment.

The equal protection issue is an allusion. Since the committing juvenile court determines that an individual child, on the basis of his particular circumstances, should be placed in the custody of a certain agency, he is not similarly situated with other juveniles who are committed to a different agency. Both are treated as similarly as possible under the differing circumstances since the legal custodian determines the plan of treatment. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940).

4/ The Commission on Law Enforcement and Administration of Justice in its Task Force Report on Juvenile Delinquency and Crime (1967) stated: "rehabilitating offenders through individualized handling is one way of providing protection [for the community] and appropriately the primary way in dealing with children." p. 9.

The straitjacket on juvenile treatment programs imposed by the District Court is patently inconsistent with this Court's recognition of the purposes of the juvenile justice system as well as unwarranted by prior equal protection decisions.

4. The District Court abused its discretion in failing to abstain from deciding the due process and equal protection issues since both holdings required the Court to first construe provisions of Georgia law not previously construed by State courts.

The due process and equal protection holdings of the Court below were based on erroneous interpretations of State law. Since the provisions relied upon by the Court below had not been construed by the State court, abstention was required to avoid the possibly needless exercise of federal equity powers to correct alleged errors of administration of the Georgia Juvenile Court Code. See Railroad Commissioners of Texas v. Pullman Co., 312 U.S. 496 (1941); Askew v. Hargrave, 401 U.S. 476 (1971); Reetz v. Bozanich, 397 U.S. 82 (1967).

The due process violation was predicated on the Court's belief that the Georgia Juvenile Court Code promised § 2304 juveniles special treatment in a secure setting which was not being provided by the DOOR/DHR agreement (p. 12a). Such an interpretation, in addition to failing to raise a federal question as argued in Part 2, also miscontrues the treatment program for juveniles. Ga. Code § 24A-2901 (Appendix E) grants to the legal custodian, including DOOR under Ga. Code § 24A-2304, "the right to determine the nature of the care and treatment of the child." In determining the nature of the care and

treatment, DOOR, as legal custodian, must comply with the specific conditions of Ga. Code § 24A-2401 --- a juvenile may not be confined in a penal institution. Even if DOOR had a juvenile facility, however, Ga. Code § 24A-2901 authorizes any other placement which it deems appropriate for the individual child, including transfer to another public or private agency or placement in a community program. In short, the Georgia Juvenile Court Code offers no specific place of confinement for any juvenile but requires the legal custodian to develop an individualized plan of rehabilitation. Looking at §§ 2304, 2401 and 2901 together, it is apparent that the provision of the DOOR/DHR agreement which transfers physical custody to DHR is authorized by State law.

The provisions of the DOOR/DHR agreement authorizing DOOR to determine the date of a § 2304 juvenile's discharge from a youth development center and final discharge from custody which the District Court held violated both State law and the equal protection clause are also valid. As the Georgia Supreme Court held in A.B.W. v. State, § 2304 commitments are subject to the limitations of Ga. Code § 24A-2701 (Appendix E). The Court below relied upon subsection (b) which provides that an order committing a child to DHR expires after two years unless the child is sooner discharged by DHR. This section relates only to the expiration of the committal order and does not relate to release from an institution

since § 2901 gives the right to decide upon release to the legal custodian. Since the legal custodian is DOOR, and since the custody was properly recognized as constitutional (p. 11a), the power to decide on discharge from a youth development center was properly vested by the agreement in DOOR.

The Attorney General advised the Departments that DOOR could decide on final discharge prior to the expiration of two years since it was reasonable to conclude that DOOR stood in the place of DHR with respect to Ga. Code § 24A-2701(b) when a juvenile court had concluded that a child was not amenable to treatment in DHR's legal custody. However, if this interpretation is incorrect, then Ga. Code § 24A-2701(c), not (b), is controlling and only the committing court can terminate the order before the two year expiration.

When all the pertinent portions of the Georgia Juvenile Court Code are considered and the system is understood, it is apparent that the District Court erred in its interpretation of State law. However, these particular State law issues have not been considered by the courts of Georgia. If State substantive law, under the quid pro quo theory, is to be grafted onto the due process clause of the Fourteenth Amendment, then the State law should first be unequivocally declared by the State appellate courts. As in City of Meridian v. Telephone and Telegraph Co., 358, U.S. 638, 640 (1959), it was an

abuse of discretion for the District Court to fail to abstain since "questions of State law are enmeshed with federal questions."

SUGGESTION OF MOOTNESS

Georgia Code § 24A-2304, the provision challenged in this action, was repealed by the Georgia General Assembly, effective March 28, 1975. In denying Appellants' Motion for New Trial, the District Court held that the repeal rendered the action moot as to future members of the class (p. 2c). In a later order, entered by the originating Judge, the Court denied a Motion to Dismiss based on the repeal because the DOOR/DHR agreement still affects juveniles previously committed to DOOR pursuant to Ga. Code § 24A-2304.

If this Court finds, however, that the repeal of Ga. Code § 24A-2304 moots this action, then both this Appeal and the proceeding below should be dismissed in accordance with the usual practice of this Court. Hodge v. Tulsa County Election Board, 335 U.S. 889 (1948); Duke Power Co. v. Greenwood, 299 U.S. 259, 267 (1936); Brownlow v. Schwartz, 261 U.S. 216, 218 (1922).

CONCLUSION

The District Court precipitously exercised jurisdiction in this case after the actual controversy between the parties had ended.

Its determination of the constitutional issues which it then contrived needlessly interferes with the administration of juvenile justice and does so without State Court interpretation of the statutes relied upon for decision.

Its due process analysis, already discredited in O'Connor v. Donaldson, and its equal protection analysis, without precedent in the decisions of this Court, conflict with this Court's insistence that the States remain free to develop varied and experimental approaches to juvenile justice and rehabilitation. McKeiver v. Pennsylvania.

For these reasons, plenary consideration of the Judgment below by this Court and its ultimate reversal are warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Timothy J. Sweeney, one of the attorneys for defendants herein and a member of the Bar of the Supreme Court of the United States hereby certify that I have served copies of the foregoing Jurisdictional Statement on the Appellees by mailing copies thereof, first class postage prepaid, to Ellen Leitzer, 88 Walton Street, N.W., Atlanta, Georgia 30303.

I further certify that all parties required to be served have been served.

This 14th day of July, 1975.

Timothy J. Sweeney

TIMOTHY J. SWEENEY
Senior Assistant
Attorney General

APPENDIX

APPENDIX A

[Filed in Clerk's Office February 7, 1975.
Ben H. Carter, Clerk. By: MJW, Deputy Clerk.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD WAYNE LONG, and all other persons similarly situated, by and through his next friend, HENRY GRADY LONG, vs. THE HON. ROMAE POWELL, individually, and as Judge of Fulton County Juvenile Court; DAVID ENGLAND, individually, and as Warden of Georgia Industrial Institute; and ALLEN AULT, individually, and as Commissioner of the Department of Offender Rehabilitation	CIVIL ACTION NO. C74-872A

Before: BELL, Circuit Judge, EDENFIELD and O'KELLEY, District Judges.

EDENFIELD, District Judge:

Lawsuits often arise as the result of incomplete planning, good intentions notwithstanding. When there arises a contingency for which inadequate provision was made (be it in a contract or statutory scheme), persons consequently harmed often turn to the courts for relief. The present action arose for precisely this reason, and the plaintiffs have brought this class action seeking declaratory and injunctive relief to redress alleged deprivations under color of state law of their Fifth, Sixth, and Fourteenth Amendment rights. More spe-

cifically, plaintiffs seek a declaration that Georgia Code Ann. § 24A-2304 is unconstitutional on its face and as applied, and seek to enjoin its further enforcement.

The statute, which is set out below,[1] deals with the power of the juvenile court judge to make a finding of fact and, consequent thereto, to commit a child[2] to an adult prison administered by the Department of Corrections/Offender Rehabilitation (hereafter "DCOR") after trial in juvenile court. This case was submitted for hearing before a three-judge court, pursuant to 28 U.S.C. §§ 2281, *et seq.*, on defendants' motions to dismiss.

Plaintiff Long has brought this action individually and as class representative for all others similarly situated. At the time the complaint was filed, Long was seventeen years old. He had been arrested and tried six months earlier as a juvenile in Fulton County Juvenile Court before defendant Powell. As a juvenile under Georgia law, he was not accorded the full due process rights given adults (*e.g.*, trial by jury or indictment by grand jury); but he was sentenced to the Georgia Industrial Institute, a prison for youthful criminal offenders administered by DCOR at Alto, Georgia. (Defendant England is warden of the Georgia Industrial Institute (hereafter "Alto") and defendant Ault is

[1] Ga. Code Ann. § 24A-2304 provides: "*Child not amenable to rehabilitation or treatment.* In the event a delinquent or unruly child is found not to be amenable to rehabilitation or treatment, the court may commit said child to the custody of the Department of Corrections."

[2] Ga. Code Ann. § 24A-401(c) defines "child" as any individual who is "(1) under the age of 17 years, (2) under the age of 21 years who committed an act of delinquency before reaching the age of 17 years and who has been placed under the supervision of the court or on probation to the court."

Commissioner of DCOR.) The complaint alleges that all the other inmates at Alto, except for plaintiff Long and the class he represents, were tried as adults, and therefore were entitled to indictment by grand jury and trial by jury before being sentenced and incarcerated for offenses similar to those of Long and his class. Had Long been seventeen when he was arrested or had he been bound over to Superior Court for criminal prosecution pursuant to Georgia Code Ann. § 24A-2501, he would have been entitled to the same full due process rights enjoyed by his fellow inmates at Alto.

The complaint focuses on the many differences between incarceration at an adult prison like Alto and incarceration at a Youth Development Center which is administered by the Department of Human Resources (hereafter "DHR"). Under Georgia Code Ann. §§ 24A-2301—2303, juveniles adjudged to be "deprived," "delinquent," or "unruly" may be ordered into institutional confinement; such a commitment is made to the custody of the Division of Community Resources of DHR. The apparent raison d'etre of these "Youth Development Camps" is to provide a controlled atmosphere of rehabilitation and treatment for children who have been adjudged to be in need of such an environment. These children are thus neither exposed to nor housed with adult felons who have committed serious crimes. The emphasis of the Youth Development Camp is to provide individualized rehabilitative treatment based upon psychological and aptitudinal testing; visiting, mail, and phone privileges are significantly more liberal at a Youth Development Camp than at an adult prison like Alto. On the other hand, plaintiffs allege, incarceration at Alto is essentially penal, with rehabilitative treatment only scarcely extant.

The core of the complaint is this: plaintiff Long and the members of his class have been confined with adult criminals in penal institutions pursuant to commitments made under § 24A-2301, despite the fact that they have been denied the full panoply of due process rights to which they would be entitled if they were tried and sentenced as adults. Plaintiffs complain that the quid pro quo which ostensibly forms the basic premise of the juvenile justice system is violated by the terms of § 24A-2304; they complain that they have given up some of their due process rights to be tried and sentenced as juveniles, on the promise that the aim of the juvenile justice system is to promote rehabilitation and treatment, not to impose punishment for crime. Plaintiffs assert, therefore, that to be tried as a juvenile and then sentenced to an adult corrections facility is fundamentally unfair and violates their rights under the Sixth Amendment and under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. Plaintiffs contend further that the statutory terms "not amenable to rehabilitation or treatment" are vague, susceptible to arbitrary application, and lack ascertainable standards.

1. MOOTNESS

Plaintiff Long and the other currently-known members of his class are no longer incarcerated at the adult prison at Alto. As the resul of a decision of the Georgia Supreme Court in February, 1974, *A.B.W. v. State*, 231 Ga. 699, 203 S.E.2d 512 (1974), DCOR and DHR agreed to place juveniles committed to the custody of DCOR pursuant to § 24A-2304 in DHR facilities. Therefore, plaintiff is presently still in the legal custody

of DCOR, but he is confined in a Youth Development Camp within the physical custody of DHR.

Defendants argue, therefore, that this action is moot since all § 24A-2304 juveniles are presently in the physical custody of DHR and will remain so unless DCOR builds an appropriate facility for them. *Golden v. Zwickler*, 394 U.S. 103 (1969). It is argued that, in any event, § 24A-2304 juveniles will no longer be incarcerated with adult criminals and will receive the treatment and rehabilitation contemplated by the Juvenile Court Code.

This court does not agree that this case is moot merely because the plaintiff is presently confined in a non-penal institution. The Supreme Court has only recently reaffirmed the rule that " 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.' " *DeFunis v. Odegaard*, 416 U.S. 312 (1974), citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), and a line of decisions. In *DeFunis*, the Court discussed in detail the elements of mootness. The Court observed that the unilateral cessation by the defendant, a state university law school, of certain of its admission practices could make the case moot only if it could be said with assurance that there did not exist any reasonable expectation that the practices would be reinstated. Otherwise, the defendant would be free to return to the prior practices. The Court stated that this fact alone would be enough to prevent mootness because of the public interest in having the legality of the practices settled.

DeFunis itself was held moot, not because of any voluntary cessation by the defendant, but because the plaintiff in that non-class action case was in the final

quarter of his final year in law school. In this action brought by all present and future § 2304 juveniles, on the other hand, it cannot be said with assurance that the defendant will not return to prior challenged practices. It is true that the *A.B.W.* decision by the Georgia Supreme Court, construing § 2304 and § 2401 together, must be read as a gloss on § 2304; this court must accept that construction "as if written into the statutes themselves." *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926). It is also true that the May 1974 agreement between DCOR and DHR was executed in an effort to implement the *A.B.W.* decision. However, that agreement effects an arguably unconstitutional application of the statute.[3] Therefore, despite the fact that the agreement, as an attempt to follow the newly-construed statute, does not constitute a strictly voluntary cessation, there is nonetheless no reasonable assurance that the agreement will prevent the defendants from applying the law in a possibly unconstitutional manner. There is in fact a certain expectation to the contrary. Plaintiff's class therefore will remain vulnerable to at least some of the practices which it challenges in this action. This court does not even remotely imply that it impugns defendants' good faith in executing this agreement. The exhibits submitted as part of defendants' supplemental brief clearly demonstrate that within days after the *A.B.W.* decision defendants began inquiry into how to implement the implications of that decision. Nonetheless, this agreement is merely one between the current commissioners of two state agencies; it has the force of law only insofar as it satisfies the commissioners' official duty to obey and enforce the law, but not insofar

[3] The unconstitutionality of § 24A-2304 as applied is discussed more fully in section 4 of this opinion, *infra*.

as its terms may conflict with that law or with federal law. Consequently, this court is not relieved of the duty of adjuciating § 2304's constitutionality by virtue of this non-binding agreement which now commits § 2304 juveniles to the physical custody of DHR. *See Gray v. Sanders*, 372 U.S. 368 (1963). Accordingly, we conclude that the case is not moot.

2. VAGUENESS OF STATUTORY TERMS

Plaintiffs contend that § 24A-2304 is unconstitutional because the terms "not amenable to rehabilitation or treatment" are vague, susceptible to arbitrary application, and lack ascertainable standards. In *A.B.W. v. State*, 231 Ga. 699, 203 S.E.2d 512 (1974), the Georgia Supreme Court placed a limiting construction on this language, holding that it means "that the child is found not to be amenable to rehabilitation or treatment *in a facility operated under direction of the court or other public local authority* and not amenable to rehabilitation or treatment in a *facility operated by* [*DHR*]." 203 S.E.2d at 514 (emphasis added).

The challenged language and the construction given it in *A.B.W.* is similar to that found in the Federal Youth Corrections Act, 18 U.S.C. § 5010, setting forth the standard employed in determining whether an individual is amenable to treatment under that statute. It provides:

> "(d) If the Court shall find that the youth offender will not derive benefit from treatment under [the Act], then the Court may sentence the youth offender under any other applicable penalty provision."

The constitutionality of this provision has been unheld.

Guidry v. United States, 433 F.2d 968 (5th Cir. 1970), and the Supreme Court has held that the trial court need state no supporting reasons for a determination made under it. *Dorszynski v. United States*, 42 U.S.L.W. 5156 (June 26, 1974).

The Georgia Supreme Court having made definite the meaning of the challenged language, and similar language having been upheld in the federal statute, we hold that the terms "not amenable to rehabilitation or treatment" in § 24A-2304 are not so vague as to deny due process or equal protection.

This court also points to the analogous federal statute, 18 U.S.C. § 5010(d), in holding that due process does not require that a separate hearing, much less a jury trial, is required when the judge makes a finding of fact that the child is not amenable to treatment or rehabilitation in the system of the Juvenile Court. Even if this § 2304 finding of fact were still to result in the penalty of incarceration in an adult prison, such penalty would still be far less drastic than the punitive effect of a § 5010(d) determination. As the federal standard and procedure have survived constitutional attack, so also the § 2304 procedure does not offend Due Process.

3. FACIAL CONSTITUTIONALITY

In *A.B.W. v. Georgia, supra,* the Georgia Supreme Court was presented with an attack on the constitutionality of § 24A-2304, as well as an attack on the consistency of that section with § 24A-2401, which provides in part that "[a] child shall not be committed to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime." The court read the two provisions as consistent:

> "We hold that the General Assembly said that a juvenile may be committed to the custody of the Department of Corrections, but the Department of Corrections must not place such juvenile in one of its institutions used primarily for the incarceration of persons convicted of crimes." 203 S.E.2d at 513.

It is apparent that the state supreme court interprets § 2304 subject to the general limitations of § 2401 and the rest of the Juvenile Court Code,[4] recognizing that the commitment of a juvenile to *any* authorized facility

[4] Juvenile proceedings in Georgia may be instituted by any person who has knowledge of the delinquency, deprivation, or unruliness of a child. Ga. Code Ann. § 24A-1602. The proceedings are initiated upon the filing of a petition in juvenile court. The petition need only allege facts which might support a finding of delinquency and may be made on the information and belief of the petitioner. Ga. Code Ann. § 24A-1603. A hearing on the allegations in the petition is conducted by the court without a jury, Ga. Code Ann. § 24A-1801(a), and the public is excluded from the hearing. Ga. Code Ann. § 24A-1801(c). A party charged with delinquency is entitled *inter alia* to the assistance of counsel, Ga. Code Ann. § 24A-2001, to introduce evidence on his own behalf, to cross-examine witnesses, and is not required to make any self-incriminating statements. Ga. Code Ann. § 24A-2002.

If, after the hearing at which the child is found to be delinquent or unruly, the court makes the § 2304 determination that the child is not amenable to rehabilitation or treatment, the court may commit the child to DCOR. A juvenile proceeding order or adjudication is not a conviction of crime and does not impose any civil disability ordinarily resulting from a criminal conviction. Nor is a child who is determined to be delinquent or unruly to be committed to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime. Ga. Code Ann. § 24A-2401.

A juvenile court judge may, however, under certain circumstances where the child is alleged to be delinquent based on conduct which is designated a crime or public offense, transfer the case for prosecution to the appropriate court having jurisdiction of the offense. Ga. Code Ann. § 24A-2501. Of course, if a juvenile case is transferred to a court with jurisdiction over crimes, the juvenile would be accorded all of the procedural safeguards which are normally attendant in any criminal proceeding.

is never considered commitment for conviction of crime but is rather "only for rehabilitation or treatment. . . ." 203 S.E.2d at 514. This interpretation having been made and, therefore, accepted as having been read into the statute itself, this court does not find that the statute is constitutionally offensive on its face. Section 2304 is now to be read as (1) proscribing the incarceration of juveniles with adult criminals and (2) directing that all juveniles will receive the treatment and rehabilitation contemplated by the Juvenile Code, regardless of which state agency has legal custody of them.

4. CONSTITUTIONALITY AS APPLIED

A judicial finding that a statute is unconstitutional is often due to a gap between the real and the ideal—between the theoretical validity of the statute on paper and the daily application of that statute in operation. Such a gap existed after the Georgia Supreme Court's constitutional salvage of § 2304 in *A.B.W.*, *supra*, and this gap was recognized by Justice Ingram in his dissenting opinion in that case. He noted that the department of Corrections (DCOR) did not at the present time have any facilities which could be used for juveniles committed to its custody pursuant to § 2304. Justice Ingram stated that he therefore did not see how the court's affirmance of the trial court's § 2304 commitment could be carried out. It was this aspect of *A.B.W.* which the plaintiffs characterized as "absolutely bizarre."

The existence of the gap apparently also failed to escape the attention of the state attorney general's office, for within a week of the *A.B.W.* decision it notified DHR of its interpretation of the holding of the case.

DHR was told that, although *A.B.W.* had not spelled it out, the only inference which could be drawn from it was that juveniles committed under § 2304 must be transferred to DHR. Attachment A, Supplemental Brief on Behalf of Defendants. This advice resulted three months later in the agreement between the commissioners of DCOR and DHR and the transfer of plaintiffs to the Youth Development Camp at Milledgeville, Georgia, operated by DHR.

Even plaintiffs applaud this agreement as modifying § 2304's former effect of committing juveniles to adult prisons. The agreement, however, does not go far enough, and consequently misapplies the statute as interpreted in *A.B.W.*[5] It is this faulty implementation of the newly-construed § 2304 which renders that statute unconstitutional as applied.

We find no constitutional violation in the mere commitment of a juvenile to the legal custody of DCOR. Defendants correctly point out that the constitutional question depends upon the nature of the incarceration, not upon the agency to whom the juvenile is committed. However, the differences in treatment do go beyond the mere question of which agency has technical custody of the juvenile, and therein lies the constitutional harm.

The most obvious deficiency in the DCOR/DHR agreement is that it flies directly in the face of the order committing the juvenile. Section 2304 envisions a juvenile court judge committing a child to DCOR because the judge finds that the DHR facilities to which

[5] Faced with the choice between concluding that the Georgia Supreme Court's reconciliation of the Georgia statutes was constitutionally deficient or concluding that the DHR/DCOR agreement misapplies § 2304 as interpreted in *A.B.W.*, we prefer the latter course.

the child would ordinarily be committed are inadequate for the treatment, rehabilitation, and security which the child's case requires.[6] The DCOR/DHR agreement ignores that finding; DCOR assumes only technical custody of the child and then places the child in a DHR facility, *i.e.*, a facility judicially concluded to be inadequate for the child's rehabilitation and treatment. This disregard of the juvenile court's commitment order gives an ironic twist to Justice Fortas's observation that ". . . there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. United States*, 383 U.S. 541, 556 (1966). The irony lies in the fact that the harm is not that the child is tried as a juvenile and sentenced as an adult, but rather that he is sentenced as a child who is not amenable to ordinary juvenile treatment and then committed to an institution where he will receive just that—ordinary juvenile treatment.[7]

The procedure provided by the DCOR/DHR agreement thus violates the quid pro quo of the *parens patriae* theory underlying the juvenile justice system. *See generally In re Gault*, 387 U.S. 1, 14-29 (1967). The plaintiffs have foregone some of the protections ac-

[6] Defendant Powell's order committing plaintiff Long under § 2304 specifically stated: "The Court further finds the said child to be in need of further treatment and rehabilitation, but the Court finds that the said child having been committed to the Georgia Department of Human Resources by previous Order of this Court, is no longer amenable to further treatment or rehabilitation in the system of the Juvenile Court." Exhibit "A" to Stipulations of Fact.

[7] Defendant admits that "presently no difference in treatment results because of such a finding [under § 2304]." Supplemental Brief in Support of Defendants' Motion to Dismiss, at 5.

corded adults in order to receive "careful, compassionate, individualized treatment," *Id.* at 18, which is the asserted rationale of diminished procedural protections for juveniles. A commitment of a juvenile to an institution which is, by statutory definition, known to be inadequate to give that juvenile the treatment his case requires is fundamentally unfair. We reach that conclusion on the reasoning that if the state interest which is required to save the juvenile system from constitutional infirmity is not rationally served by the administration of that system, then to deprive the juvenile of rights to which he would otherwise be entitled as an adult is fundamentally unfair. To treat the juvenile proceeding as "civil," thereby denying the child certain important rights which would be available in a criminal proceeding—to proceed on the premise that the state is acting as *parens patriae*, promising that "the objectives are to provide measures of guidance and rehabilitation for the child and protection of society, not to fix criminal responsibility, guilt and punishment," *Kent, supra* at 554—and then to commit the child for rehabilitative treatment which the state *knows* to be inadequate, constitutes a violation of the child's right to due process. It is this implementation of § 24A-2304 which renders it unconstitutional as applied. *See generally Baker v. Hamilton*, 345 F.Supp. 345 (W.D. Ky. 1972); Clark, "The New Juvenile Court Code of Georgia," 7 Ga.St.B.J. 409, 418 (1971).

Besides violating the terms of the commitment order, the DCOR/DHR agreement is an unconstitutional application of § 2304 also insofar as it imperfectly implements the Georgia Supreme Court's construction of that statute in *A.B.W. v. Georgia, supra:*

> "In short, commitment *to the Department* of Corrections under Code Ann. § 24A-2304 is still for rehabilitation or treatment, such rehabilitation or treatment merely taking place in a facility that provides superior security and protection.
>
> "In any event, the commitment of a juvenile to any authorized facility is not commitment for conviction of a crime. Such commitment is only for rehabilitation or treatment and is subject to the limitations and conditions contained in Code Ann. § 24A-2701." 203 S.E.2d at 514.

The clear import of *A.B.W.* is, therefore, that the state may commit a child to the custody of DCOR, if it wishes, but that the child must be treated *as a child in all respects*. The Georgia Supreme Court has interpreted the purpose of a § 2304 commitment to be to afford the child rehabilitation and treatment "in a facility having greater security and protection measures than those facilities referred to in Code Ann. § 24A-2302(c,d) [*i.e.*, operated by DHR]." 203 S.E.2d at 514. With this sole exception, juveniles committed under § 2304 are to be dealt with no differently than other juveniles committed under the Code.

Yet the effect of the DCOR/DHR agreement is that other differences in treatment do exist:

—*A.B.W.* expressly held that a § 2304 commitment is "subject to the limitations and conditions contained in Code Ann. 24A-2701." 203 S.E.2d at 514. Section 24A-2701(b) provides that an order of juvenile commitment continues in force for two years or "until the child is sooner discharged by the Division of Children and Youth [DHR]."[8] The DCOR/DHR agreement, however, specifically provides that a release from a Youth Development Camp to aftercare status requires the "concurrence" of DCOR, and that final "discharge from custody recommendations" will be submitted by DHR to DCOR for "final disposition." Stipulations of Fact, Exhibit "B". The agreement therefore violates § 2701(b) and would violate it even if plaintiffs were in the physical, as well as the technical, custody of DCOR (such as would be the case if DCOR were ever to build facilities suitable for § 2304 juveniles). Section 2701(b) commits the discharge decision solely to DHR. For the agreement to require that § 2304 juveniles, unlike other juveniles, cannot be discharged without the concurrence or final approval of DCOR is fundamentally unfair and violates their right to equal protection of the laws.

[8] The Division of Children and Youth is the predecessor of the Division of Community Services, which is the division of DHR responsible presently for the administration of Youth Development Camps.

—With regard to the dozen juveniles who, prior to the May 20, 1974 DCOR/DHR agreement, were assigned to the adult prison at Alto when committed under § 2304, their records now reflect the fact that they have been incarcerated in an adult prison despite their juvenile status. Georgia Code Ann. Chapter 24A-35 regulates the files and records of juveniles, providing that juvenile court files and records are open to inspection only upon order of the court. GA. CODE ANN. § 24A-3501. Furthermore, law enforcement records and files concerning a juvenile are required to be kept separate from those of adults. However, with the consent of the court, inspection of the records and files is permitted for judicial, law endorcement, penal, and rehabilitation purposes. GA. CODE ANN. § 24A-3502. The court is required to seal the records and files of the juvenile proceeding if, after a hearing, it finds that the child has been rehabilitated, and that two years after his final discharge he has not been convicted of a crime, ad-

judicated delinquent, and is not subject to a pending proceeding. *After sealing, inspection of the records* is permitted only by order of the court upon petition of the person who is the subject of the records. GA. CODE ANN. § 24A-3504.

Despite these broad statutory protections of the juvenile's anonymity, the recorded fact that a juvenile has been incarcerated in an adult prison may well have an adverse effect upon his life. The court finds no fault in the records showing that the juvenile was committed pursuant to a § 2304 finding, since there is nothing constitutionally offensive in committing a child who is in need of relatively greater security and supervision to a facility which can provide that in addition to the rehabilitative treatment he requires. Such a distinction among juveniles is not unreasonable, and there is no harm in the records indicating it. However, the connotations of a child having been committed to an adult prison go far beyond that reasonable distinction, and could disproportionately influence decisions made in later years by law enforcement officials, courts, penal institution officials, or parole boards.[9] Such a result denies these juveniles due process under the reasoning of *Kent* and *Gault, supra*, and is therefore to be avoided. Accordingly, the records of these juveniles who have been incarcerated in adult prisons must be expunged of any indication of that fact.

With regard to juveniles committed pursuant to

[9] Plaintiff's counsel at oral argument asserted that inspection of juvenile records is not confined to those persons named in the statute, but that records are routinely made available to employers and others. There being no evidence in the record to support such an assertion, we decline to consider it, leaving any such alleged violations of the Juvenile Court Code to appropriate state administrative or judicial remedy.

§ 2304 as implemented by the new DCOR/DHR agreement, their records must likewise not reflect incarceration in adult prisons pending DCOR's "delivery" of the juveniles to the DHR facility. Since DCOR has no juvenile facilities even for temporary physical custody of juveniles during whatever administrative processing may be required, it follows that § 2304 juveniles will be housed with adult criminals at least temporarily. Such temporary custody in an adult prison for a reasonably short time pending transferral to a Youth Development Camp does not offend due process, *cf. Hamilton v. Chaffin*, ___ F.2d ___ (5th Cir. Jan. 15, 1975), but the juvenile's records, if they are to indicate that fact at all, must clearly reflect that such custody was temporary and only pending processing.[10]

5. DEFENDANT POWELL'S MOTION TO DISMISS

Defendant Powell is the juvenile court judge who ordered the commitment of plaintiff Long pursuant to § 2304. Judge Powell contends that she was acting within her judicial capacity in performing that act, and is therefore neither a necessary nor proper party. However, the declaratory and injunctive relief sought by the plaintiffs here is equitable relief, and there is ample authority for the proposition that a judge is not immune from being ordered to render equitable relief in a civil rights action brought pursuant to 42 U.S.C. § 1983, so long as there is no real interference with the dis-

[10] The named plaintiff alleges that he spent forty days in the Fulton County Jail, an adult facility, before DCOR managed to transfer him to Alto. This court does not consider forty days to be a "reasonably short time," and such delay in transferring a juvenile to a DHR facility would, in the judgment of this court, violate due process as well as the legislative intent of § 74A-2401.

cretionary functions of the judge. *See Cheramie v. Tucker*, 493 F.2d 586 (5th Cir. 1974), and cases cited at n.6. This court having concluded that § 24A-2304 is unconstitutional as applied, there is little, if any, possibility that our injunction will upset the Judge's discretionary functions. Moreover, our declaratory judgment that § 2304 is unconstitutional as applied renders injunctive relief with respect to Judge Powell unnecessary. Accordingly, her motion to dismiss will be denied.

SUMMARY

Georgia Code Ann. § 24A-2304 provides that juveniles determined by the juvenile court "not to be amenable to rehabilitation or treatment" within the juvenile court system's ordinary facilities, may be committed to the custody of the Department of Corrections/Offender Rehabilitation. The Georgia Supreme Court upheld that statute's constitutionality, construing it to mean only that such a juvenile may be committed to a facility of superior security and protection, there to receive individual rehabilitative treatment like other juveniles. In an effort to bring their conduct within the scope of the state supreme court decision, DCOR and DHR agreed that DCOR should retain legal custody over the juvenile and make decisions as to release, but that DHR should assume physical custody of the juvenile in one of its own facilities.

—The case is not moot since there is a continuing harm to plaintiffs (both present and future members of the class) flowing from the unconstitutional implementation of the statute through the DCOR/DHR agreement.

—The terms used in the statute are not vague, and are neither unusually susceptible to arbitrary application nor lacking in ascertainable standards.

—The statute is constitutional on its face, the limiting construction of the Georgia Supreme Court in *A.B.W. v. Georgia, supra,* having become a gloss on the statute.

—The statute is unconstitutional as applied by the DCOR/DHR agreement because it provides for commitment of the § 2304 juvenile to a DHR facility, in direct contradiction of the finding and order of the juvenile court, thus denying the juvenile his right to due process. The agreement also imperfectly implements *A.B.W.* since it gives DCOR either concurrent or final decision-making power as to release, in violation of Georgia Code Ann. § 24A-2701(b), thus denying the juvenile his right to equal protection of the laws. Furthermore, the § 2304 juvenile's records may reflect that he has been incarcerated in an adult prison, with serious potential collateral consequences, thus also running afoul of the juvenile's due process rights.

Accordingly, it is hereby ORDERED and ADJUDGED:

(1) That Georgia Code Ann. § 24A-2304 is unconstitutional as applied, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States;

(2) That defendants shall not commit any juvenile to incarceration in an adult penal institution, except for a reasonably short time pending administrative processing and transfer to an appropriate facility;

(3) That defendants shall not commit a juvenile

pursuant to § 24A-2304 to an ordinary DHR facility without making provision for the greater protection, security and rehabilitative treatment mandated by the juvenile court's determination that he is not amenable to ordinary treatment and rehabilitation. Such provision might, for example, take the form of separate housing and more individualized programs;

(4) That defendants shall expunge from the records of the juveniles committed to adult prisons prior to the May 20, 1974 agreement any notation of that fact. Similarly, with regard to future members of the plaintiff class who are committed to the custody of DCOR pursuant to § 24A-2304, if there is any record made of an interim confinement in an adult prison pending transfer to the physical custody of DHR, that record must clearly reflect the temporary nature of the confinement;

(5) That, pursuant to Georgia Code Ann. § 24A-2701(b), the decision to release a § 2304 juvenile from a Youth Development Camp to aftercare status, or to grant a final discharge, shall rest exclusively with DHR, the agency directly involved in the juveniles' treatment plans; and

(6) That defendants' motions to dismiss are DENIED.

So ORDERED, this 7th day of February, 1975.

/s/ GRIFFIN B. BELL

GRIFFIN B. BELL
United States Circuit Judge

/s/ NEWELL EDENFIELD

NEWELL EDENFIELD
United States District Judge

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX B

[Filed in Clerk's Office February 11, 1975.
Ben H. Carter, Clerk. By: LN, Deputy Clerk.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD WAYNE LONG, and all other persons similarly situated, by and through his next friend, HENRY GRADY LONG VS THE HON. ROME POWELL, individually, and as Judge of Fulton County Juvenile Court; DAVID ENGLAND, individually, and as Warden of Georgia Industrial Institute; and ALLEN AULT, individually, and as Commissioner of the Department of Offender Rehabilitation	C74-872A

JUDGMENT

This action came on for consideration before the Court, Honorable GRIFFIN B. BELL, United States Circuit Judge, Honorable NEWELL EDENFIELD, United States District Judge and Honorable WILLIAM C. O'KELLEY, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, finding for the plaintiffs and against the defendants,

It is Ordered and Adjudged that the plaintiffs RICHARD WAYNE LONG, and all other persons similarly situated, by and through his next friend, HENRY GRADY LONG recover of the defendants THE HON. ROMAE POWELL, individually, and as Judge of Fulton County Juvenile Court; DAVID

ENGLAND, individually, and as Warden of Georgia Industrial Institute; and ALLEN AULT, individually, and as Commissioner of the Department of Offender Rehabilitation, their costs of action.

Dated at Atlanta, Georgia this 11th day of February, 1975.

FILED AND ENTERED
IN CLERK'S OFFICE
February 11, 1975
BEN H. CARTER, Clerk

BEN H. CARTER, Clerk

By: LORAINE NELTING
Deputy Clerk

By: LORAINE NELTING
Deputy Clerk

APPENDIX C

[Filed in Clerk's Office March 28, 1975.
Ben H. Carter, Clerk. By: PLE, Deputy Clerk.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD WAYNE LONG, and all other persons similarly situated, by and through his next friend, HENRY GRADY LONG, vs. THE HON. ROMAE POWELL, individually, and as Judge of Fulton County Juvenile Court; DAVID ENGLAND, individually, and as Warden of Georgia Industrial Institute; and ALLEN AULT, individually, and as Commissioner of the Department of Offender Rehabilitation	CIVIL ACTION NO. C74-872A

Before: BELL, Circuit Judge, EDENFIELD and O'KELLEY, District Judges.

PER CURIAM:

This case has been resubmitted upon defendants' motion for new trial, pursuant to Fed.R.Civ.P. 59, on the grounds that this court committed manifest errors of law in "determining crucial questions of State law not yet decided by the Courts of Georgia. . . ."

It appearing to the court that the statutory provision which was the subject of this litigation, GA. CODE ANN. § 24A-2304, has recently been repealed in its entirety by the Georgia General Assembly, House Bill No. 860, the motion for new trial is DENIED. The case

no longer encompasses any substantial federal question, and is, furthermore, moot as to future members of the plaintiff class.

So ORDERED, this 25th day of March, 1975.

/s/ GRIFFIN B. BELL

GRIFFIN B. BELL
United States Circuit Judge

/s/ NEWELL EDENFIELD

NEWELL EDENFIELD
United States District Judge

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX D

[Filed in Clerk's Office May 16, 1975.
Ben H. Carter, Clerk. By: NB, Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD WAYNE LONG, et. al., *Plaintiffs,* vs. THE HON. ROMAE POWELL, et. al. *Defendants.*	CIVIL ACTION NO. C74-872A

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

1.

Notice is hereby given that Honorable Romae Powell, Judge of the Juvenile Court of Fulton County and Allen Ault, Commissioner of the Department of Offender Rehabilitation, individually and in their official capacities, defendants in the above-styled action, hereby appeal to the Supreme Court of the United States from the Order dated February 7, 1975, and entered February 11, 1975, and the Judgment entered February 11, 1975.

2.

The above named defendants also appeal from the order denying defendant's timely motion for new trial which order was dated March 25, 1975, and entered March 28, 1975, insofar as said order found the action moot only as to future members of plaintiff's class but not as to present members.

3.

Pursuant to Rule 10(4) of the Rules of the Supreme Court, the defendants above-named hereby further

given notice of their belief that defendant David England has no interest in the outcome of this appeal.

This 16th day of May, 1975.

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy
Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
Deputy Attorney General

/s/ TIMOTHY J. SWEENEY
TIMOTHY J. SWEENEY
Senior Assistant
Attorney General

/s/ DOROTHY Y. KIRKLEY
DOROTHY Y. KIRKLEY
Assistant Attorney General

Please serve:

Dorothy Y. Kirkley
132 State Judicial Building
Atlanta, Georgia 30334
Phone: 656-3343

CERTIFICATE OF SERVICE

I, Timothy J. Sweeney, one of the attorneys for defendants herein and a member of the Bar of the Supreme Court of the United States hereby certify that I have served copies of the foregoing Notice of Appeal on the several parties by mailing copies thereof, first class postage prepaid, to each of the following:

Ellen Leitzer
88 Walton Street, N.W.
Atlanta, Georgia 30303

Charles L. Carnes
6650 Powers Ferry Road
Suite 206
Atlanta, Georgia 30339

I further certify that all parties required to be served have been served.

This 16th day of May, 1975.

/s/ TIMOTHY J. SWEENEY
TIMOTHY J. SWEENEY
Senior Assistant
Attorney General

APPENDIX E

Statutes Involved

1. Ga. Code § 24A-2401. Order of Adjudication; Non-Criminal.

(a) An order of disposition or other adjudication in a proceeding under this Act is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment. A child shall not be committed to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime.

(b) The disposition of a child and evidence adduced in a hearing in the juvenile court may not be used against him in any proceeding in any court other than for a proceeding for delinquency or unruliness, whether before or after reaching majority, except in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report.

2. Ga. Code § 24A-2701. Limitations of Time on Orders of Disposition.

(a) An order terminating parental rights is without limit as to duration.

(b) An order of disposition committing a delinquent or unruly child to the Division of Children and Youth continues in force for two years or until the child is sooner discharged by the Division of Children and Youth. The court which made the order may extend its duration for an additional two years subject to like discharge, if:

(1) a hearing is held upon motion of the Division of Children and Youth prior to the expiration of the order;

(2) reasonable notice of the factual basis of the motion of the hearing and an opportunity to be heard is given to the child and the parent, guardian, or other custodian; and

(3) the court finds that the extension is necessary for the treatment or rehabilitation of the child.

(c) Any other order of disposition in a proceeding involving delinquency, unruliness and deprivation except in an order involving the appointment of a guardian of the person or property of a child continues in force for not more than two years. The court may sooner terminate its order or extend its duration for further periods. An order of extension may be made if:

(1) a hearing is held prior to the expiration of the order upon motion of a party or on the court's own motion;

(2) reasonable notice of the factual basis of the motion, of the hearing and opportunity to be heard are given to the parties affected;

(3) the court finds that the extension is necessary to accomplish the purposes of the order extended; and

(4) the extension does not exceed two years from the expiration of prior order.

(d) Except as provided in subsection (b) the court may terminate an order of disposition or extension prior to its expiration, on or without an application of a party, if it appears to the court that the purposes of the order have been accomplished.

(e) Except as provided in subsection (a) or otherwise by law, when the child reaches 21 years of age, all orders affecting him then in force terminate and he is discharged from further obligation or control.

3. Ga. Code § 24A-2901. Rights and Duties of Legal Custodian. A custodian to whom legal custody has been given by the court under this Code has the right to physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide for the care, protection, training, and education, and the physical, mental, and moral welfare of the child, subject to the conditions and limitations of the order and to the remaining rights and duties of the child's parents or guardian.

4. Ga. Code § 24-3502. Law Enforcement Records. Law enforcement records and files concerning a child shall be kept separate from the records and files of arrests of adults. Unless a charge of delinquency is transferred for criminal prosecution under Section 24A-2501, the interest of national security requires, or the court otherwise orders in the interest of the child, the records and files shall not be open to public inspection or their contents disclosed to the public; but, with the consent of the court, inspection of the records and files is permitted by:

(a) A juvenile court having the child before it in any proceeding;

(b) Counsel for a party to the proceedings;

(c) The officers of public institutions or agencies to whom the child is committed;

(d) Law enforcement officers of other jurisdictions when necessary for the discharge of their official duties; and

(e) A court in which he is convicted of a criminal of-

fense for the purpose of a presentence report or other dispositional proceeding, or by officials of penal institutions and other penal facilities to which he is committed, or by a parole board in considering his parole or discharge or in exercising supervision over him.